

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
RCN Corporation)	CSR-8166
Petition for Special Relief)	

ORDER ON RECONSIDERATION

Adopted: May 18, 2010

Released: May 19, 2010

By the Chief, Media Bureau:

I. INTRODUCTION

1. We have before us the petitions of Montgomery County, Maryland to reconsider the Media Bureau's Order granting RCN Corporation ("RCN") relief from certain requirements of the Commission's rules regarding proof-of-performance tests for cable systems and to stay the Media Bureau's Order pending reconsideration.¹ The Media Bureau's Order relieved RCN from the requirement to perform proof-of-performance tests on certain systems which RCN has converted to all-digital operation. Montgomery County primarily objects that RCN failed to serve its petition on the county as required by the rules, preventing the county from raising substantive arguments in opposition to the petition. For the reasons discussed herein, we grant Montgomery County's Petition for Reconsideration, rescind the relief granted to RCN, and dismiss Montgomery County's Petition for Stay as moot.

II. BACKGROUND

2. As mandated by Congress, the Commission's rules specify minimum technical standards for the operation and signal quality of cable television systems.² These standards specify precisely the minimum characteristics of an analog cable signal that must be present at subscribers' terminals.³ The technical standards, as well as the testing regime and recordkeeping requirements relating to those standards, are referred to collectively as the "proof-of-performance" rules.⁴ Among other things, the rules require cable systems to conduct tests twice yearly to verify compliance with the technical standards.⁵ The cable system must retain the results for inspection by the Commission and local franchising authorities ("LFA").⁶ The rules also provide that the Commission may grant relief from the technical standards for cable systems using nonconventional techniques, though the Commission may prescribe

¹ See *RCN Corp. Petition for Special Relief*, Order, 24 FCC Rcd 12874 (MB, 2009) ("Order").

² See 47 U.S.C. § 544(e); see also 47 C.F.R. § 76.605. The Commission adopted the current technical standards governing the signal quality of cable channels in 1992. See *Cable Television Technical and Operational Requirements*, Report and Order, 7 FCC Rcd 2021 (1992), *aff'd in part and modified in part*, Memorandum Opinion and Order, 7 FCC Rcd 8676 (1992).

³ See 47 C.F.R. § 76.605.

⁴ See 47 C.F.R. § 76.601 (testing requirement); 47 C.F.R. § 76.605 (technical standards); 47 C.F.R. § 76.609 (methods and requirements for performing the tests); 47 C.F.R. § 76.1704-1705 (recordkeeping requirements).

⁵ See 47 C.F.R. § 76.601(b).

⁶ See 47 C.F.R. § 76.1704(a).

special technical requirements to ensure that subscribers to such systems receive an equivalent level of “good quality service.”⁷

3. On April 7, 2009, RCN submitted a petition seeking relief as provided in the rules from performing certain measurements prescribed by the proof-of-performance rules.⁸ As described in its Petition for Special Relief, RCN has converted some of its systems to all-digital operation and no longer maintains any analog channels on these systems.⁹ These systems include the Washington, DC system, which includes Montgomery County, Maryland.¹⁰ RCN’s conversion to digital also covers their Chicago, Illinois; Boston, Massachusetts; and New York City, New York systems.¹¹ On June 5, 2009, the Media Bureau placed RCN’s petition on Public Notice.¹² No comments were received in response.

4. On October 19, 2009, the Media Bureau released a decision granting RCN’s petition, explaining that subsections 76.605(a)(1)-(11) of the technical standards specifically deal with characteristics of analog signals that are not present with digital transmission.¹³ The Media Bureau explained that requiring RCN to perform proof-of-performance tests on its all-digital systems and to maintain the results for inspection would impose “an unnecessary expense and provide[] no benefit to the public.”¹⁴ The Media Bureau’s Order provided, however, that RCN must provide a good quality signal to subscribers; RCN must comply with the complaint resolution provisions in Section 76.1713; and the relief granted will continue until such time as the Commission revises its rules to address systems utilizing all-digital transmission.¹⁵

5. On November 17, 2009, Montgomery County, the LFA for the portion of RCN’s Washington, DC system located within the county, filed a Petition for Reconsideration of the Media Bureau’s Order.¹⁶ Montgomery County argues that (1) RCN did not serve any of the affected LFAs with its petition; (2) the Media Bureau’s Public Notice did not inform interested persons of the petition; and (3) the Media Bureau should have imposed interim measures pending a revision of the current standards to address systems utilizing all-digital transmission.¹⁷ Montgomery County also submitted a Petition for Stay of the Media Bureau’s Order pending reconsideration.¹⁸ RCN filed oppositions to both of these petitions.¹⁹

⁷ See 47 C.F.R. § 76.605(b).

⁸ See RCN Corporation, Petition for Special Relief, File No. CSR-8166 (April 27, 2009) (“Petition for Special Relief”).

⁹ See *id.* at 2.

¹⁰ See *id.* at 1.

¹¹ See *id.*

¹² See Special Relief and Show Cause Petitions, Report No. 0286 (June 5, 2009).

¹³ See Order, 24 FCC Rcd at 12875, ¶ 4. The Media Bureau’s Order maintained the requirement that RCN measure signal leakage on all frequencies, as required by Section 76.605(a)(12). See *id.*

¹⁴ See *id.* at 12785, ¶ 5.

¹⁵ See *id.* at 12785-86, ¶¶ 5-6.

¹⁶ See Montgomery County, Petition for Reconsideration, File No. CSR-8166 (Nov. 17, 2009) at 4 (“Montgomery County Petition for Reconsideration”).

¹⁷ See *id.* at 4-9.

¹⁸ See Montgomery County, Petition for Stay, File No. CSR-8166 (Nov. 17, 2009).

¹⁹ See RCN, Opposition to Petition for Reconsideration, File No. CSR-8166 (Dec. 2, 2009) (“RCN Opposition”); RCN, Opposition to Petition for Stay, File No. CSR-8166 (Dec. 2, 2009).

III. DISCUSSION

6. Montgomery County's primary argument is that RCN did not serve the affected LFAs with its Petition for Special Relief.²⁰ Section 76.7 of the Commission's rules requires a petition for special relief to be served on any interested party, including an LFA, who is likely to be directly affected if the requested relief is granted.²¹ The proof-of-performance rules provide that operators who cannot meet the technical requirements due to the technology employed by the system may be exempted after a sufficient showing to the Commission pursuant to the substantive standard of Section 76.7.²² Section 76.7 was specifically incorporated into this provision to assure affected LFAs that they could participate in the process.²³ It is undisputed that RCN failed to serve its Petition for Special Relief on Montgomery County, or any other affected LFA, as required. Moreover, we agree with Montgomery County that RCN's failure to serve the affected LFAs was not harmless.²⁴ While Montgomery County raises substantive concerns in its Petition for Reconsideration, considering these arguments at the reconsideration stage will not cure the procedural defect because it is unclear whether Montgomery County has set forth all of its substantive arguments in its Petition for Reconsideration. Moreover, in light of RCN's failure to serve any LFAs, it is unknown whether other LFAs that may be impacted by the Petition for Special Relief would have raised substantive concerns had they known of the request.

7. RCN argues that the Public Notice issued by the Media Bureau was sufficient to put Montgomery County and other LFAs on notice.²⁵ Montgomery County notes, however, that the Public Notice merely listed "Washington, DC," and three other metropolitan areas and did not list specific counties impacted by the Petition for Special Relief.²⁶ Moreover, we note that RCN is not a registered cable operator in Washington, DC specifically.²⁷ Therefore, a search of the Commission's publicly available cable registration information would not have readily revealed the scope of the "Washington, DC" system operated by RCN.²⁸ In any event, the rules require affirmative service of notice on LFAs in these circumstances, and it is no cure for failure to do so that an LFA might have discovered RCN's petition through their own efforts. Therefore, we do not view the Media Bureau's Public Notice announcing RCN's Petition for Special Relief to have corrected RCN's failure to serve interested persons or to have otherwise provided the affected LFAs with sufficient notice.

8. For the foregoing reasons, we grant Montgomery County's Petition for Reconsideration, rescind the relief granted to RCN in the Media Bureau's Order, and return RCN's Petition for Special Relief to pending status. To the extent RCN seeks to continue to prosecute its Petition for Special Relief,

²⁰ See Petition for Reconsideration at 4-5.

²¹ See 47 C.F.R. § 76.7(a)(1), (3).

²² See 47 C.F.R. § 76.605(b) ("Cable televisions systems ... [that] cannot comply with one or more of the technical standards set forth in paragraph (a) of this section, may be permitted to operate: Provided, That an adequate showing is made pursuant to § 76.7 which establishes that the public interest is benefited.").

²³ *Review of the Technical and Operational Requirements of Part 76*, Report and Order, 7 FCC Rcd 2021, 2031 (1992).

²⁴ See Montgomery County, Reply, File No. CSR-8166 (Dec. 11, 2009) at 4-5 ("Montgomery County Reply").

²⁵ See RCN Opposition at 12-13.

²⁶ See Montgomery County Petition for Reconsideration at 5-6; Montgomery County Reply at 3-4.

²⁷ RCN operates as a non-cable multichannel video programming distributor ("MVPD") in the cities of Washington, DC; Gaithersburg, MD; New York, NY; and portions of the Boston, Massachusetts metropolitan area.

²⁸ By comparison, a search for "RCN" and "Chicago" returns the complete scope of the Chicago, Illinois system operated by RCN, including its operation in Skokie, Illinois. This information is available, and updated in real time, at the Media Bureau's Cable Operations and Licensing System found on the Internet at www.fcc.gov/coins.

we require RCN to serve all affected parties, including LFAs, with the petition as required by Section 76.7(a)(3) and to file proof of service with the Commission. Upon receipt of the proof of service, the Media Bureau will again place RCN's Petition for Special Relief on Public Notice. Upon the conclusion of the new Public Notice period and consideration of all comments received, the Media Bureau will consider RCN's Petition for Special Relief anew. In light of our decision to grant Montgomery County's Petition for Reconsideration and to rescind the relief granted to RCN, we dismiss Montgomery County's Petition for Stay as moot.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED**, pursuant to Sections 0.61, 0.283, 1.3, and 76.605(b) of the Commission's Rules, 47 C.F.R. §§ 0.61, 0.283, 1.3, 76.605(b), that Montgomery County's Petition for Reconsideration **IS GRANTED**.

10. Further, **IT IS ORDERED**, pursuant to Sections 0.61, 0.283, 1.3, and 76.605(b) of the Commission's Rules, 47 C.F.R. §§ 0.61, 0.283, 1.3, 76.605(b), that the relief granted to RCN by the Media Bureau's *Order*, 24 FCC Rcd 12874 (MB, 2009), **IS RESCINDED**.

11. Further, **IT IS ORDERED**, pursuant to Sections 0.61, 0.283, 1.3, and 76.605(b) of the Commission's Rules, 47 C.F.R. §§ 0.61, 0.283, 1.3, 76.605(b), that Montgomery County's Petition for Stay **IS DISMISSED AS MOOT**.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau